

**STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE**
45 Fremont Street
San Francisco, CA 94105

RH05049799

June 28, 2007

TITLE 10. INVESTMENTS
CHAPTER 5. INSURANCE COMMISSIONER

Article 7.1
***TITLE INSURANCE STATISTICAL PLAN
AND RELATED RULES GOVERNING RATES AND CHARGES***

Summary and Response to Comments Received During
May 9 to May 29, 2007 Revised Regulation Comment Period

VOLUME 11

Comment No. "May.Comments 1-24"

Commentator: Robert Hogeboom & Suh Choi on behalf of LandAmerica Insurance Group

Date of Comment: May 29, 2007

Type of Comment: Written

Summary of Comment (pages 1-2):

The commentator summarizes the history of the proposed regulations and the commentator's previous comments about those prior drafts of the regulations.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (page 3):

The commentator presents a summary of the changes set forth in the Commissioner's proposed revisions to the regulations and the commentator's general view that the regulations conflict with California Insurance Code sections 12401, *et seq.*

Response to Comment:

This portion of the comment presents a summary of arguments set forth in greater detail in the subsequent pages of the commentator's comment. Each comment, and the Department's response, will be specifically addressed below.

Summary of Comment (pages 4-5):

The Commissioner's Government Code section 11346.3(c) business reporting statement is conclusory, and does not address any of the factors that Government Code section 11346.3 requires him to consider.

Response to Comment:

The Commissioner rejects this comment. The Government Code section 11346.3(c) statement is intended to notify affected members of the public about the Commissioner's determination of the need for businesses to report information as part of his regulations. This finding is supported by the Commissioner's supporting documents within the rulemaking file, which describe in greater detail the necessity for the regulation and the estimated impact upon businesses.

Contrary to the commenter's suggestion, the Commissioner has, in fact, carefully considered the costs of compliance and determined them to be necessary and justified by the need for effective rate-regulation of this industry with over \$4 billion in California revenue. He has also carefully considered the comments submitted in this file regarding the costs of compliance. The commenter has not identified any empirical data or analysis the Commissioner should consider that he has not considered, and the commenter has proffered no evidence of probative value on the cost of compliance.

Summary of Comment (page 5):

There is no evidence in the rulemaking record that shows that the Commissioner has made any meaningful analysis of the factors that he is required to consider, pursuant to Government Code section 11346.3. The Commissioner's belief that California consumers need lower title rates does not provide a meaningful consideration of the impact of the regulations on the industry.

Response to Comment:

This comment is merely a restatement of the comments submitted on the earlier draft of the proposed regulations. The Commissioner incorporates his responses to those objections by reference. Moreover, this portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (pages 5-7):

The commentator reiterates comments presented on the earlier drafts of the regulation. These comments include remarks such as:

- The Commissioner has failed to consider the negative effect that the revised regulations will have on consumers and the market.
- The use of industry averages in the regulatory formula will reduce competition, and will stifle industry innovation.
- The Commissioner's statistical plan is contrary to Insurance Code section 12401.5 because it is not a "reasonable" plan and was only meant to allow the Commissioner to require the industry to report aggregate data.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments were previously presented by the commentator and other commentators as part of the comments submitted on the prior versions of the proposed regulations and were responded to within the rulemaking file accordingly.

Summary of Comment (page 7-8):

The Commissioner has not sufficiently identified the documents that he intends to rely upon. While the Commissioner made the ALTA Claims Code document available for public inspection as part of his April 30, 2007 Notice of Revised Text, he has not provided any information regarding how he intends to utilize the ALTA Claims Codes. The regulations, therefore, lack clarity.

Response to Comment:

The Commissioner rejects this comment. Revised section 2356.8 clearly identifies the manner in which the ALTA Claims Codes are to be used for purposes of the regulations. (See Detailed Claim Report, field TI15.I, in section 2356.8(o)). To the extent that the commentator is referring to documents other than the ALTA Claims Codes, which are identified in the OAL Decision of Disapproval, the Department has confirmed that the ALTA Claims Codes document represents the only document which must be incorporated by reference within these regulations.

Summary of Comment (pages 8-9):

The Commissioner's reliance upon the *20th Century Ins. Co.* case is misplaced because the case is distinguishable and therefore irrelevant. To the extent that the Office of Administrative Law has concurred with the Commissioner's view that the *20th Century*

case authorizes the Commissioner to promulgate a ratemaking formula, both agencies' reliance is in error. While the *20th Century* case stands for the proposition that a ratemaking formula does not necessarily fix rates, it does not follow that all ratemaking formulas cannot fix rates and therefore are automatically lawful. Moreover, the *20th Century* case noted that an open competition system of regulation would not permit the adoption of rate regulations. The formulas used by the Commissioner and those utilized in Proposition 103 are fundamentally different. While the Proposition 103 formulas use company specific data, the proposed title insurance regulations would seek to fix rates at industry averages. This has the practical effect of fixing the rate at a level that has little relation to the title entity's own experience.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (pages 10-17 and attached Legislative Counsel Opinion):

The commentator reiterates the comments previously submitted in response to the earlier versions of the proposed regulations. These comments include remarks challenging the Commissioner's authority to promulgate the regulations, the findings in the Birnbaum Competition Report, the hearing procedures set forth in the regulations, and the reasonableness of the statistical plan. The comments also include an assertion that rates under the proposed regulations will be confiscatory.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators in response to the prior versions of the proposed regulations and the Commissioner summarized and responded to these comments within the rulemaking file accordingly.

Comment No. “May.Comments 25”

Commentator: Bob Carter

Date of Comment: May 16, 2007

Type of Comment: Written

Summary of Comment (page 1):

The commentator states that the proposed regulations are a challenging read and requests that the Department assist the commentator by providing examples of what the title insurance cost would be under current pricing methods versus under the proposed regulations.

Response to Comment:

To the extent that this comment could be read to suggest that the new revisions to the proposed regulation are difficult to understand and should include examples, the Commissioner rejects this comment. The Commissioner believes that the level of sophistication of those who would be obliged to comply with the regulations is such that the proposed regulations are comprehensible. The regulations, while complex, are understandable to those subject to its provisions while still fulfilling the Commissioner’s rate regulatory duties in an effective manner.

Moreover, this portion of the comment is not specifically directed at the Commissioner’s proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Comment No. “May.Comments 26-33”

Commentator: David Cheit on behalf of First American Title Ins. Co.

Date of Comment: May 29, 2007

Type of Comment: Written

Summary of Comment (page 1):

This passage summarizes First American’s submissions relative to the proposed regulations.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner’s proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (pages 1-2):

This portion of the comment summarizes the Office of Administrative Law's ("OAL") Decision of Disapproval ("Decision").

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (page 2):

OAL's Decision noted an exemption set forth in the Administrative Procedure Act for "a regulation that establishes or fixes rates, prices or tariffs." OAL then requested that the Commissioner indicate his position on whether the rationale of exemption described in *20th Century v. Garamendi*, 8 Cal.4th 216 (1994) ("*20th Century*") is applicable to the title insurance and escrow regulations and whether the rate-limiting regulations contained in subarticles 3 and 4 are subject to the APA. The revised regulations do not appear to respond to OAL's request for this statement. First American objects to this failure to address this issue in a manner than allows for public comment in advance of any resubmission of the regulations to OAL.

Response to Comment:

The Commissioner rejects this comment. The commenter has failed to identify any grounds, via statute, regulation or case law, for its contention that the Department of Insurance is required to respond to OAL's request for clarification in a manner that would permit public comment. Moreover, this portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) To the extent that this comment could be construed to suggest that the proper procedure in proposing the changes requires the Commissioner to invite public comment concerning the use of the ratemaking exception of the APA, the Commissioner's response is set forth above. No further response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (pages 2-3):

The Decision cites to *20th Century* as authority for the view that the Commissioner "may set the upper limits on rates that are not excessive, notwithstanding the language in (Insurance Code) Section 12401 which indicates that Article 5.5 [beginning with Insurance Code Section 12401] does not provide the power to fix and determine a rate level. *20th Century* authorized the Commissioner to set the upper limits on rates (and impose rate reductions) for coverages subject to Proposition 103, which does not include title insurance.

The coverages affected by Proposition 103 were previously subject to their own statutory provision, identical in form to Section 12401, which denied the Commissioner any power

to fix or determine rate levels – but that prohibition was eliminated by Proposition 103 with respect to the coverage affected by that ballot initiative,

Accordingly, *20th Century* is properly read to permit the Commissioner to “fix and determine” rate limits only for the coverages that are specifically subject to the rollback and rate reductions provisions of Proposition 103, where the statutory prohibition on such actions has been repealed. Conversely, the rationale of *20th Century* applies to the proposed title regulations not because it brings them within the APA exemption of Gov’t Code Section 11340.9(g) but because it brings them within the continuing prohibition on rate fixing in Insurance Code 12401 – because title insurance remains subject to the same type of prohibition on fixing rates that was eliminated by Proposition 103.

This distinction is critical to the question of OAL’s authority to review the proposed regulations because it raises the issue of whether OAL may determine whether a given agency has authority to issue regulations that purport to fix or determine rate levels. Section 11340.9(g) expressly exempts from OAL’s review process any regulation that “establishes or fixes rates, prices or tariffs” but it does not specify whether OAL is empowered to determine, in the first instance, whether an agency has authority to issue regulations that would be subject to that exemption.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner’s proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (page 3):

It is anomalous for an agency to be able to avoid OAL review by enacting regulations that exceed its own authority – by purporting to fix or determine rates despite a specific statutory prohibition of such actions. The purposes of the APA are better served if OAL exercises its power to conduct an initial review of the regulations that potentially invoke the statutory exemption, in order to determine whether the agency has the authority to take the proposed action.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner’s proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (page 3):

OAL’s review should result in OAL’s determination that the Commissioner does not have the authority to fix or determine rate levels because title insurance remains subject to a statutory prohibition that no longer applies to Proposition 103 coverages and,

therefore, the rationale of *20th Century* applies to the proposed regulations only to confirm that they do not indeed “fix” rate level, as prohibited by Section 12401.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner’s proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (page 3):

The OAL Decision noted that the proposed regulations failed to include a finding by the Commissioner that it is necessary for the proposed regulations to apply to business. In response, the Notice of Availability of Changed Text states that it is necessary for the proposed regulations to apply to business.

This recital is not accompanied by a statement of factual support for that determination. Based on the Commissioner’s continuing discussions with the affected parties concerning possible alternatives to the proposed regulations, the Commissioner has no factual basis on which to determine the regulations are capable of compliance by the regulated entities, let alone “necessary for the health, safety or welfare of the people of this state.”

The Commissioner’s failure to show any factual basis for a determination of necessity is a substantive defect.

Response to Comment:

The Commissioner rejects this comment. The statement referred to by the commenter, required pursuant to Government Code section 11346.3(c), is intended to notify affected members of the public about the Commissioner’s determination of the need for businesses to report information as part of his regulations. This finding is supported by the Commissioner’s supporting documents within the rulemaking file, which describe in greater detail the necessity for the regulation and the estimated impact upon businesses.

Contrary to the commenter’s suggestion, the Commissioner has, in fact, carefully considered the costs of compliance and determined them to be necessary and justified by the need for effective rate-regulation of this industry with over \$4 billion in California revenue. He has also carefully considered the comments submitted in this file regarding the costs of compliance. The commenter has not identified any empirical data or analysis the Commissioner should consider that he has not considered, and the commenter has proffered no evidence of probative value on the cost of compliance.

Summary of Comment (pages 4-5):

The original version of the proposed regulations included (and the recent revision includes) an immediate preemptive “finding” that a reasonable degree of competition does not exist in four specific areas of the title insurance business, with no provision for developing or evaluating the information necessary for the Commissioner to make such a

finding now or in the future. This “finding” renders the regulations invalid. The most recent version of the regulations has failed to remedy this fundamental defect.

The Insurance Code authorizes the Commissioner to regulate title insurance rates if certain predicate conditions exist, including a lack of a reasonable degree of competition in specified aspects of the industry. The Code provides a system under which the Commissioner may derive and continually update his findings on all predicate conditions, including the degree of competition in the industry through annual reports.

The Commissioner’s proposed scheme does not follow the Code’s direction to subject all his findings to the mandated process of comprehensive data collection, annual reporting, thorough methodological analysis and regular review. Instead, the Commissioner’s proposed scheme is based on a private determination based on private data and private criteria. Further, there is no provision for review or consideration of newer or complete data even though the “finding” would not be for three years after it was first promulgated.

This continuing failure to provide for “full-scale regulatory review” of the market competitiveness issue invalidates the entire scheme, regardless of what factors make up the proposed rate parameters or when his proposed “interim rates” would take effect.

The Commissioner has now abandoned his claim of urgency with respect to the interim rates, thus he has abandoned any plausible rationale for maintaining his unilateral “findings” as a basis for rate regulations that will not take effect until 2009. If there is time to implement and operate a comprehensive system of gathering and evaluating data as a basis for evaluating rate levels before the Commissioner may actually regulate rates, clearly there is also time to implement the same type of system as a basis for determining degrees of competition in the title insurance business.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner’s proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 5):

As stated in First American’s earlier comments, the Commissioner does not have authority to impose unilateral rate rollbacks. The revised rollback system works differently than the original rollback system, but constitutes an identical abuse of authority because both operate outside the regulatory structure the Legislature intended to be used in evaluating title insurance rates.

As explained in First American's earlier comment letter, Proposition 103 did not, by its terms, extend to title insurance and the Insurance Code does not authorize the Commissioner to set fixed maximum rates for title insurance similar to those for coverages expressly affected by Proposition 103. The repeal of the statutory provision that denied the Commissioner the power to "fix or determine rates" appeared only in Proposition 103 and that same provision remains in effect for the title insurance statutes.

Proposition 103 requires the Commissioner to implement maximum rollback rates for specific coverages without regard to whether they might be deemed excessive, but that does not extend to title insurance. Moreover, the Commissioner's arbitrary determination of maximum "interim" rollback rates to take effect on a predetermined date pursuant to proposed section 2357.19 amounts to a "prior approval" system under which the prospective use of any noncomplying rate is automatically disapproved prior to its use. The Commissioner is clearly prohibited from adopting a "prior approval" system of rate regulation for title insurance and, therefore, the rollback regulations (as originally proposed and revised) are in excess of his authority.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 5-6):

Even if some form of "interim rates" were authorized by the Legislature and justified by a showing of economic necessity, the formula proposed in the revised regulations is not a reasonable or appropriate method of adjusting rates. As explained in the attachment to First American's comment letter provided earlier, the formula is poorly conceived, inadequately explained and based on assumptions that are either untenable or irrelevant.

The "interim rates" now represent a backup formula to take effect for as long as the "permanent" formula is not yet operational. The overall applicability of the "interim formula" is as broad as the "permanent formula" and should not be substituted into the regulatory proposal without the same degree of scrutiny afforded to the "permanent" formulas. The Commissioner's abandonment of the original proposal for "interim rates" and his substitution of the current proposal constitutes a change of sufficient magnitude to require a 45-Day notice period and public hearing, the denial of which amounts to another ground for rejection of these regulations.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 6):

The remainder the regulatory scheme as carried forward in the most recent revisions is unreasonable and unworkable.

First, the proposed regulations establish a "maximum rate of return" using a risk premium that is unrealistic in amount and underlying methodology. Second, the additional documents now relied on by the Commissioner in support of the regulations are questionable in terms of methodology or their relevance to the proposed regulations. Finally, as previously stated, the revised proposal is fatally flawed because it rests on the spurious premise that comprehensive price regulation would benefit purchasers of title insurance in California.

Price regulation as proposed by the Commissioner would reduce innovation, reduce competition, reduce benefits to consumers and have the exactly opposite effect from the Department's stated goal of "invigorating market forces and returning a reasonable degree of competition to the business of title insurance."

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) To the extent the commenter alleges that the additional document, the ALTA CLAIMS CODES (2002) ("Claims Codes"), relied upon by the Commissioner is questionable in terms of methodology, the commenter fails to provide any explanation or support for this contention. The Commissioner believes to the contrary; that the Claims Codes are relied upon and regularly used by the title industry. Accordingly, this portion of the comment is rejected.

Comment No. “May.Comments 34-35”

Commentator: Professor Joseph W. Eaton

Date of Comment: May 21, 2007

Type of Comment: Written

Summary of Comment (page 1-2):

The proposed regulations will provide a reasonable or possibly more than reasonable return on investments for title insurers and will only result in marginal changes to the status quo. The commentator has co-authored a book which documents the manner in which most states impose burdens on consumers who purchase real estate. Transaction costs will continue to be excessive under the Commissioner’s proposed regulations because valid title insurance policies will continue to be confiscated and nullified when a homeowner refinances a mortgage. California should conduct a thorough review of why the same services offered in California can be offered in other states at a significantly lower cost to consumers.

Response to Comment:

The Commissioner rejects this comment to the extent it can be read to suggest that the proposed regulations will continue to permit excessive rates. To the contrary, the proposed regulations are designed to prohibit rates which are excessive and persist within the current regulatory climate in California. The proposed regulations take into consideration the lesser costs of preparing and issuing a title insurance policy for a refinancing. The regulations also recognize the fact that title insurance policies in other states often result in lesser charges to consumers for the same insurance product. The proposed regulations and statistical plan will identify those costs which are justified and eliminate those costs which are not necessary to produce the title or escrow product. The regulations, therefore, are necessary to prevent excessive rates.

Moreover, this portion of the comment is not specifically directed at the Commissioner’s proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Comment No. “May.Comments 36-46”

Commentator: LeBoeuf, Lamb, Greene & MacRae LLP, on behalf of Fidelity National Financial, Inc.

Date of Comment: Received May 29, 2007

Type of Comment: Written

Summary of Comment (page 1):

This passage introduces Fidelity National Financial, Inc. (formerly Fidelity National Title Group, Inc.) and its title insurance subsidiaries, collectively designated “FNF”

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (pages 1-2):

This portion of the comment summarizes the Office of Administrative Law's ("OAL") Decision of Disapproval ("Decision") and states that OAL "directed" the Commissioner to indicate his position on the rationale of the exemption described in *20th Century v. Garamendi*, 8 Cal.4th 216 (1994) ("20th Century").

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (page 2):

While the May 9, 2007 dated version of the proposed regulations purports to cure the deficiencies stated in OAL's Decision, the Commissioner did not specify in the regulations whether he is invoking the ratemaking exemption. If OAL reviews the rate-limiting provisions, FNF contends that the provisions cannot satisfy the rulemaking standards for OAL approval because the Commissioner has no authority to set or make rates. Because the statistical plan is intertwined thereto, it must also fail.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (pages 2- 3):

The Legislature did not confer upon the Commissioner the authority to set or cap title insurance rates. The Commissioner implicitly recognized this issue inasmuch as he didn't cite to any statutory authority that specifically authorizes him to issue regulations that fix or set a limit on rates.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 &

11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 3):

Section 12401 of the Insurance Code prohibits the Commissioner from setting or capping title insurance rates.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 3):

The Commissioner contends that he is neither fixing nor capping rates because: 1) the prohibition in Section 12401 of the Insurance Code is inapplicable to the regulations because establishing a maximum rate does not constitute rate setting and 2) that he is authorized to set maximum rates pursuant to *20th Century*. Each of these arguments is without merit.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (pages 3-4):

Characterization of the rate cap as something other than an effort to "fix and determine a rate level by classification or otherwise" is sophistry. This is just a play on words to avoid the prohibition from the Legislature. The proposed regulations establish a maximum rate the way Proposition 103 did for property and casualty insurers and, therefore, "fix and determine a rate level" above which title insurers may not charge, in violation of Section 12401. The regulations also violate Section 1851(d) which provides that Proposition 103 does not apply to title insurers.

Moreover, the suggestion that the California title insurers and UTCs have the flexibility to adopt a rate other than the maximum rate is unrealistic in the present economic environment. See table 1 (attached to the comment) reflecting that the five largest publicly traded title insurer groups are earning modest profits. Four of the five earned a profit margin less than 1.4% last quarter and one company had a negative rate of return.

Furthermore, as reflected in earlier testimony of Dr. David Appel, the ratemaking formula used to derive the maximum rate will result in an insufficient rate of return. In order to avoid insolvency, title insurers will charge the maximum rate and the Commissioner's rate will become a promulgated rate.

The situation is just as dire for the UTCs based on previous testimony from Patricia Laffin (Placer Title Company).

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 5):

20th Century does not authorize the Commissioner to issue rate-limiting title insurance regulations. In *20th Century*, the court upheld rate rollback regulations predicated on the determination that Proposition 103 provided the authority for the regulations. The court in *20th Century* went on to say that absent that authority, the Commissioner would not have had the power to issue rate-limiting regulations. In this case, Section 12401 remains effective and continues to prohibit the Insurance Commissioner from setting title rates. Moreover, Section 1851(d) specifically exempts title insurers from Proposition 103.

The Commissioner's inability to identify a statutory grant of authority to issue the regulations is a fatal deficiency.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 6):

FNF incorporates its previous submissions in support of its argument that the rate-limiting provisions fail to satisfy the rulemaking standards.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 6):

The statistical plan provisions are intertwined with the rate-limiting provisions of the proposed regulations. It appears that CDI first developed its ratemaking formula and then worked backwards to determine the data to make it work. The statistical plan was conceived solely to implement the rate-limiting formula.

Because the rate-limiting provisions of the proposed regulations are invalid, the Commissioner cannot establish that the statistical plan provisions satisfy the necessity component of the APA requirements. Accordingly, the statistical plan provisions are invalid.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (pages 6-7):

The Commissioner's selection of a January 1, 2008 implementation date is patently unfair.

The regulations, as originally proposed dated November 27, 2006 and submitted to OAL on January 5, 2007, required the title insurance industry to implement the statistical plan on January 1, 2008. The proposed regulations dated April 30, 2007 do not reduce the scope of the statistical plan and not a single component is eliminated. To the contrary, the 72 changes of "should" to "shall" adds 72 mandatory provisions to the proposed regulations and, yet, in spite of the passage of time and the increased burden for

implementing the statistical plan, the proposed regulations still require the industry to implement the statistical plan on January 1, 2008.

Response to Comment:

This comment is accepted in part and rejected in part. By a Notice of Availability (“Notice”) dated May 9, 2007, the public was notified that the proposed regulations were being modified to, amongst other things, require insurers to collect data for 2008 and begin reporting in 2009 and that those insurers that did not comply with the data reporting requirements would be subject to an interim maximum permissible rate, beginning in 2009.

The Commissioner’s Notice dated May 30, 2007 delays the data collection reporting requirement and interim rate imposition for an additional year. Accordingly, the proposed regulations impose data collection requirements on insurers for their business operations and transactions in 2009 and require initial reporting in 2010.

Summary of Comment (page 7):

Compliance with the statistical plan by January 1, 2008 is impossible. This date was selected notwithstanding industry testimony that it was impossible to meet this deadline. FNF’s Chief Information Officer submitted written testimony dated August 30, 2006 that even if he were to employ an army of outside consultants, it would take a minimum of 18 months to implement the statistical plan to the point of a 99% error-free requirement. This information was repeated at a workshop on May 9, 2007. FNF and First American accounts for two-thirds of all title insurance premiums in collected in California. Patricia Laffin testified that UTCs rely on third-party, off-the-shelf software which has a similar development time, even assuming these products are created at all.

Response to Comment:

This comment is accepted in part and rejected in part. By a Notice of Availability (“Notice”) dated May 9, 2007, the public was notified that the proposed regulations were being modified to, amongst other things, require insurers to collect data for 2008 and begin reporting in 2009 and that those insurers that did not comply with the data reporting requirements would be subject to an interim maximum permissible rate, beginning in 2009.

The Commissioner’s Notice dated May 30, 2007 delays the data collection reporting requirement and interim rate imposition for an additional year. Accordingly, the proposed regulations impose data collection requirements on insurers for their business operations and transactions in 2009 and require initial reporting in 2010.

Summary of Comment (page 8):

The Commissioner’s proposed solution will not resolve this problem. CDI has explained that it intends to submit the proposed regulations in the form dated as of April 30, 2007 to OAL on or before June 28, 2007. CDI also stated that it plans to continue holding workshops on the statistical plan thereafter in an effort to develop amendments that reduce the burden of compliance with the statistical plan.

Insurance Code Section 12401.5 provides that no statistical plan or modifications thereto or rules or regulations pertaining thereto shall be adopted or implemented absent compliance with (a portion of the Government Code), except that any plan, rule or regulation shall not be effective for a period of 120 days following its adoption.

Accordingly, even if the Commissioner were to submit the proposed regulations to OAL on or about June 28, 2007, the proposed regulations would not be effective, at the earliest, on or about December 10, 2007, a mere 3 weeks before the industry is required to implement the statistical plan.

As reflected in table 2 (attached), if the Commissioner were to promulgate amendments to the proposed regulations, these amendments would likely not become effective until approximately mid-February 2008, six weeks after the industry is required to implement the statistical plan.

Response to Comment:

This comment is accepted in part and rejected in part. By a Notice of Availability (“Notice”) dated May 9, 2007, the public was notified that the proposed regulations were being modified to, amongst other things, require insurers to collect data for 2008 and begin reporting in 2009 and that those insurers that did not comply with the data reporting requirements would be subject to an interim maximum permissible rate, beginning in 2009.

The Commissioner’s Notice dated May 30, 2007 delays the data collection reporting requirement and interim rate imposition for an additional year. Accordingly, the proposed regulations impose data collection requirements on insurers for their business operations and transactions in 2009 and require initial reporting in 2010.

Summary of Comment (page 9):

The absence of any binding agreement on the part of the Commissioner to suspend compliance with the statistical plan until the amendments become effective, upon any OAL approval of the proposed regulations, the industry would have to immediately undertake good-faith efforts to comply with the statistical plan. Should the Commissioner fail to promulgate amendments to his statistical plan, the title companies face the risk that the Commissioner may seek to impose fines on those title companies that fail to begin collecting data under the statistical plan on January 1, 2008.

Response to Comment:

This comment is accepted in part and rejected in part. By a Notice of Availability (“Notice”) dated May 9, 2007, the public was notified that the proposed regulations were being modified to, amongst other things, require insurers to collect data for 2008 and begin reporting in 2009 and that those insurers that did not comply with the data reporting requirements would be subject to an interim maximum permissible rate, beginning in 2009.

The Commissioner's Notice dated May 30, 2007 delays the data collection reporting requirement and interim rate imposition for an additional year. Accordingly, the proposed regulations impose data collection requirements on insurers for their business operations and transactions in 2009 and require initial reporting in 2010.

Summary of Comment (page 10) :

Compliance efforts are likely to cost the industry millions of dollars. Thus, even if the Commissioner were amenable to making subsequent changes to the proposed regulations, in the absence of stay by the Commissioner or the courts, the industry would be required to spend hundreds of millions of dollars developing systems to comply with the Commissioner's original statistical plan.

Further, this tremendous cost would be imposed on the industry when the real estate economy is at its lowest point in recent history and title companies are suffering losses or earning very modest profits. Compliance will, thus, cause significant harm to title companies.

Furthermore, title companies will have to make significant changes to their business models to collect the requested data. FNF previously testified that it has already reduced its staff to the bare minimum needed to meet customer expectations. Obligating the companies to comply with additional reporting requirements will increase the time to process title insurance orders. Meanwhile, customers will expect to receive the same level of service and order processing time, which impacts borrowing costs. As a result, title insurance companies will be unable to meet the needs of their customers because of the data obligations.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Comment No. "May.Comments 47-48"

Commentator: Lisa Lunde

Date of Comment: May 14, 2007

Type of Comment: Written

Summary of Comment (page 1-2):

The commenter states that she is no longer a California resident and suggests that someone else would be better suited to review the proposed regulations.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Comment No. "May.Comments 49-54"

Commentator: Paul Chang

Date of Comment: May 28, 2007

Type of Comment: Written

Summary of Comment (page 1-6):

The commenter describes in detail his lawsuit in the state of Nevada, which concerns allegations that a title insurer forged documents related to the commenter's real estate transaction, and then sued the commenter on the grounds of "slander of title."

The commenter urges the California Department of Insurance to investigate the commenter's allegations concerning this Nevada transaction and to conduct audits of transactions such as the commenter's transaction. The commenter attaches a number of documents which concern the commenter's Nevada lawsuit.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Comment No. "May.Comments 55"

Commentator: Russell Erickson

Date of Comment: May 29, 2007

Type of Comment: Written

Summary of Comment (page 1):

The proposed regulations will benefit lawyers and accountants by requiring more jobs to deal with the state bureaucracy which will be required by the regulations' reporting requirements. The regulations will add unnecessary expense to businesses in California and are an example of government waste at the citizens' expense. The regulations will not benefit citizens and may increase the cost of title insurance.

Response to Comment:

To the extent that this comment supports the reduction of title insurance rates, no response is necessary. The remainder of the commenter's remarks have been considered and rejected. While the proposed regulations are indeed detailed and technical, the Commissioner has concluded that the proposed regulations are reasonable and necessary in order to effectively prohibit excessive rates and to ensure that the Department collects the data necessary to prohibit such rates in the future.

Moreover, this portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

Comment No. "May.Comments 56-57"

Commentator: Pamela Gresko

Date of Comment: May 25, 2007

Type of Comment: Written

Summary of Comment (page 1-2):

The commentator has resubmitted her comments, verbatim, from a submission previously sent to the Department in August of 2006. The commentator states that the proposed regulations will force many notaries and other persons employed in the real estate market out of work. The commentator urges the Commissioner to stop further regulation of these persons.

Response to Comment:

These comments were summarized and responded to as part of the summary and response to the comments received in August of 2006. To the extent that the commentator believes that notaries' rates will be affected by the new regulations, those concerns are misplaced. (See Ins. Code section 12340.7.)

Moreover, this portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations, the additional ALTA Claims Codes document relied upon, or to the procedures followed in proposing these changes and additions to the rulemaking file. No response is, therefore, necessary. (Government Code Sections 11346.9 & 11346.8(c).)

**STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
45 Fremont Street
San Francisco, CA 94105**

RH05049799

June 28, 2007

**TITLE 10. INVESTMENTS
CHAPTER 5. INSURANCE COMMISSIONER
Article 7.1
***TITLE INSURANCE STATISTICAL PLAN
AND RELATED RULES GOVERNING RATES AND CHARGES*****

Summary and Response to Comments Received During
May 31 to June 15, 2007 Revised Regulation Comment Period

VOLUME 11

Comment No. “June Comments, 1-9”

Commentator: David A. Cheit of Stevens & O’Connell for First American Title Insurance Company

Date of Comment: June 15, 2007

Type of Comment: Written

Summary of Comment (page 1):

This passage summarizes First American’s submissions relative to the proposed regulations.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner’s proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (pages 1-2):

This passage summarizes the revisions to the proposed regulations, i.e., the one-year delay of the effective date for the reporting requirements and rate regulation.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner’s proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (page 2):

The earlier proposed revised regulations fail to address issues mentioned earlier by First American. They do not respond to OAL’s request for a position as to whether the proposed regulations are subject to the APA adoption procedures (including OAL

review). Nor do the proposed regulations contain or identify factual support for the Commissioner's determination that it is necessary for the proposed regulations to apply to businesses.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (pages 2-5):

The proposed regulations call for rate regulation based on "findings" regarding competition that are four years old, with no exception for expiration or review. The original version of the proposed regulations included a finding that there was no reasonable degree of competition in four areas of title insurance, as a predicate to long-term rate regulation and interim rates to take effect in 2007, while long-term rate formulas were being developed. Subsequent versions of the regulations have eliminated interim rates, making them an alternative only if the long-term formulas were not ready for use on a schedule provided for in the proposed regulations.

None of these changes in effective dates have been accompanied by a provision for reviewing or updating the initial findings regarding market competition. Accordingly, the Commissioner proposes comprehensive rate regulation in 2010 based on "findings" made outside the regulatory process in 2005-2006.

As set forth in First American's earlier comments, the "findings" are invalid on a number of grounds, including the following: 1) the law does not prohibit the Commissioner from working outside the data-call methodology to develop findings on market competition and the Commissioner had discretion to do so; 2) the need for limits upon unfettered rates cannot be delayed on the grounds that additional data collection would be useful to confirm the Commissioner's findings; 3) it was reasonable for the Commissioner to develop a comprehensive approach to the development of rate-setting formulas before considering methodologies for using the results of data calls to evaluate market competition; 4) data calls to be implemented by the regulations for rate-setting purposes would in fact develop information that could be used in evaluating market competition on an ongoing basis; and 5) the fact that methodologies for evaluating market competition did not exist in the current regulations did not prevent the Commissioner or anyone else from proposing the adoption of such methodologies in the future.

The original version of the regulations called for almost immediate rate rollbacks based on unilateral "findings" which did not allow for a structure that would review these "findings." Now immediate rollbacks have been eliminated and interim rates have been extended, first from 2007 to 2009 and now to 2010. The elimination of the claimed need for immediate rate regulation means the need for continued reliance on unilateral market competition "findings" should be eliminated too.

It is manifestly unreasonable for the Commissioner to impose rate regulation in 2010 based upon his views of market competition in 2005-2006. It is equally unreasonable to seek adoption of a rate regulatory scheme that addresses only rate formulas without addressing the companion issue of market competition on an ongoing basis.

The findings will be out of date and there is now ample time to review them. The Commissioner's response to the comments appear to agree with the following principles: 1) it is preferable to have a regulatory process that includes procedures and methodologies to develop and review findings on market competition (rather than leave this to the unilateral and unreviewable discretion of the Commissioner); 2) a data call process and related methodologies provide means for developing and evaluating information on an ongoing basis with respect to market competition; and 3) by delaying implementation of rate regulation so that the data collection process can be reviewed and tailored, time could be spent on tailoring the process to develop and review findings on market competition without causing further delay in the regulatory process.

Implementation must be conditioned upon: a regulatory process that provides for development and periodic review of findings concerning competition in the title insurance business; and actual and valid adoption of findings pursuant to the regulatory process that a reasonable degree of competition does not exist in the specified area of business at a time when rate regulation is to be imposed on any entity, in compliance with Insurance Code Section 12401.3.

Response to Comment:

The Commissioner rejects this comment. The commenter notes correctly the finding can be modified in response to changes in market conditions. The Commissioner may decide to amend the regulation in the future (a decision that might be informed by the data provided in the statistical plan), and any member of the public may, at any time, petition the Commissioner to adopt such an amendment and support the petition with whatever information that person may choose to present.

Summary of Comments (page 5):

The current version of the proposed regulations: 1) eliminates the Commissioner's objection to evaluate market competition on an ongoing basis (because the delay provides for a time period sufficient to develop such a structure); 2) creates an absolute need for such a structure because the "findings" are unilateral and will be so far out-of-date in 2010 so as to be ineffective support for rate restriction as a matter of law; and 3) contain no provision for development or review of findings on market competition that would occur at a time when the findings could provide a valid basis for rate regulation as of 2010.

At a minimum, implementation of the current proposal must be conditioned on: 1) promulgation and implementation of a regulatory process that provides for the development of and periodic review of findings concerning competition in the title insurance business; 2) actual and valid adoption of findings, pursuant to that regulatory process, that a reasonable degree of competition does not exist in the specified area of

business at the time rate regulation is to be imposed, pursuant to Insurance Code Section 12401.3.

Response to Comment:

See the response to the immediately preceding comment.

Summary of Comment (pages 6-7):

As stated in earlier comments, the Commissioner lacks the authority to impose unilateral rate rollbacks. The Commissioner cites to Proposition 103 in support of his authority for rollbacks to interim rates. As set forth in earlier comments, that assertion is erroneous.

Proposition 103 does not apply to title companies and the Insurance Code does not authorize the Commissioner to set fixed maximum rates for title insurers. The repeal of the statutory provision that denied the Commissioner the power to “fix or determine rates” appears only in Proposition 103; that same provision remains in effect relative to title insurance companies. No other provision of law permits the Commissioner to expand the scope of Proposition 103 to apply to title insurers.

Moreover, the Commissioner’s determination of maximum “interim” rollback rates to take effect on a predetermined date amount to a “prior approval” system under which the prospective use of any non-complying rate is automatically disapproved prior to its use. This is clearly beyond the authority of the Commissioner.

Even if some form of “interim rates” were approved by the Legislature and justified by a showing of economic necessity, as set forth in the report by Analysis Group (submitted in connection with an earlier report) the formula proposed in the revised regulations is poorly conceived, inadequately explained and based on assumptions that are either untenable or irrelevant.

Further, as explained in an earlier comment, the “interim rates” are a backup formula for full-scale regulation for so long as the “permanent” formula is not yet operational. Since the applicability of the “interim formula” is just as broad as the “permanent rates,” it should not be substituted into the regulatory proposal without the same degree of scrutiny afforded to the “permanent” formulas. The Commissioner’s abandonment of the original proposal constitutes a change requiring a 45-Day Notice and public hearing.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner’s proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (page 7):

The regulatory scheme as carried forward in the most recent revisions is unreasonable and unworkable.

First, the proposed regulations establish a “maximum rate of return” using a risk premium that is unrealistic in amount and underlying methodology. Second, the additional

documents now relied on by the Commissioner in support of the regulations are questionable in terms of methodology or their relevance to the proposed regulations. Finally, as previously stated, the revised proposal is fatally flawed because it rests on the spurious premise that comprehensive price regulation would benefit purchasers of title insurance in California.

Price regulation as proposed by the Commissioner would reduce innovation, reduce competition, reduce benefits to consumers and have the exactly opposite effect from the Department's stated goal of "invigorating market forces and returning a reasonable degree of competition to the business of title insurance."

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (pages 7-8):

This portion of the comment sets forth a recapitulation of the contentions set forth above.

Response to Comment:

See the responses to the various comments set forth above.

Comment No. "June Comments 10-20"

Commentator: Fidelity National Title Company

Date of Comment: Received May 29, 2007

Type of Comment: Written

Summary of Comment (page 1):

This passage introduces Fidelity National Financial, Inc. (formerly Fidelity National Title Group, Inc.) and its title insurance subsidiaries, collectively designated "FNF"

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).)

Summary of Comment (pages 1-2):

This portion of the comment summarizes the Office of Administrative Law's ("OAL") Decision of Disapproval ("Decision"), and states that while OAL is typically charged with reviewing and approving or disapproving proposed insurance regulations, Insurance Code Section 11340.9(g) exempts from review regulations that establish or fix rates. This portion of the comment provides that Commissioner Garamendi did not clarify whether he was invoking this ratemaking exemption and that in its order, OAL "directed" the Commissioner Poizner to indicate his position on the rationale of the exemption described in *20th Century v. Garamendi* is applicable to any of the title insurance and

escrow regulations and whether the rate-limiting regulations in Subarticles 3 and 4 are subject to the APA.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 2):

While the May 9, 2007 issued version (and the May 30, 2007 further revised version) of the proposed regulations purports to cure the deficiencies stated in OAL's Decision, the Commissioner did not specify in the regulations whether he is invoking the ratemaking exemption. If OAL reviews the rate-limiting provisions, FNF contends that the provisions cannot satisfy the rulemaking standards for OAL approval because the Commissioner has no authority to set or make rates. Because the statistical plan is intertwined thereto, it must also fail.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 3):

The Legislature did not confer upon the Commissioner the authority to set or cap title insurance rates. The Commissioner implicitly recognized this issue inasmuch as he didn't cite to any statutory authority that specifically authorizes him to issue regulations that fix or set a limit on rates.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 3):

Section 12401 of the Insurance Code prohibits the Commissioner from setting or capping title insurance rates.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 3):

The Commissioner contends that he is neither fixing nor capping rates because: 1) the prohibition in Section 12401 of the Insurance Code is inapplicable to the regulations because establishing a maximum rate does not constitute rate setting and 2) that he is authorized to set maximum rates pursuant to *20th Century*. Each of these arguments is without merit.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (pages 4-5):

Characterization of the rate cap as something other than an effort to "fix and determine a rate level by classification or otherwise" is sophistry. This is just a play on words to avoid the prohibition from the Legislature. The proposed regulations establish a maximum rate the way Proposition 103 did for property and casualty insurers and, therefore, "fix and determine a rate level" above which title insurers may not charge, in violation of Section 12401 because the rate-limiting provisions of the proposed regulations do not permit insurers to charge a rate in excess of an amount the Commissioner determines is appropriate. The regulations also violate Section 1851(d) which provides that Proposition 103 does not apply to title insurers.

Moreover, the suggestion that the California title insurers and UTCs have the flexibility to adopt a rate other than the maximum rate is unrealistic in the present economic environment. See table 1 (attached to the comment) reflecting that the five largest publicly traded title insurer groups are earning modest profits. Four of the five earned a profit margin less than 1.4% last quarter and one company had a negative rate of return.

Furthermore, as reflected in earlier testimony of Dr. David Appel, the ratemaking formula used to derive the maximum rate will result in an insufficient rate of return. In order to avoid insolvency, title insurers will charge the maximum rate and the Commissioner's rate will become a promulgated rate.

The situation is just as dire for the UTCs based on previous testimony from Patricia Laffin (Placer Title Company).

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (pages 5-6):

20th Century does not authorize the Commissioner to issue rate-limiting title insurance regulations. In *20th Century*, the court upheld rate rollback regulations predicated on the determination that Proposition 103 provided the authority for the regulations. The court in *20th Century* went on to say that absent that authority, the Commissioner would not have had the power to issue rate-limiting regulations. In this case, Section 12401 remains effective and continues to prohibit the Insurance Commissioner from setting title rates. Moreover, Section 1851(d) specifically exempts title insurers from Proposition 103.

The Commissioner's inability to identify a statutory grant of authority to issue the regulations is a fatal deficiency.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 6):

FNF incorporates its previous submissions in support of its argument that the rate-limiting provisions fail to satisfy the rulemaking standards.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).)

Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 7):

The statistical plan provisions are intertwined with the rate-limiting provisions of the proposed regulations. It appears that CDI first developed its ratemaking formula and then worked backwards to determine the data to make it work. The statistical plan was conceived solely to implement the rate-limiting formula.

Because the rate-limiting provisions of the proposed regulations are invalid, the Commissioner cannot establish that the statistical plan provisions satisfy the necessity component of the APA requirements. Accordingly, the statistical plan provisions are invalid.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (page 7):

The Commissioner's selection of a January 1, 2009 implementation date is unreasonable.

The regulations, as originally proposed dated November 27, 2006 and submitted to OAL on January 5, 2007, required the title insurance industry to implement the statistical plan on January 1, 2008. The proposed regulations dated April 30, 2007 do not reduce the scope of the statistical plan and not a single component is eliminated. To the contrary, the 72 changes of "should" to "shall" adds 72 mandatory provisions to the proposed regulations and, yet, in spite of the passage of time and the increased burden for implementing the statistical plan, the proposed regulations still require the industry to implement the statistical plan on January 1, 2008.

The Commissioner has, in his proposed regulations, extended the implementation dates by one year in order to: 1) fine tune the proposed statistical plan, and 2) identify and implement an alternative solution to the problems sought to be addressed in the proposed regulations.

FNF contends that, notwithstanding the extension of implementation dates, the proposed implementation dates are still unreasonable.

Response to Comment:

The Commissioner rejects this comment. By a Notice of Availability dated May 9, 2007, the public was notified that the proposed regulations were being modified to require insurers to collect data for 2008 and begin reporting in 2009 and that those insurers who did not comply with the data reporting requirements would be subject to an interim maximum permissible rate, beginning in 2009. The Commissioner's Notice of Availability dated May 30, 2007 delays the data collection reporting requirement and interim rate imposition for an additional year. Accordingly, the proposed regulations impose data collection requirements on insurers for their business operations and transactions in 2009 and require initial reporting in 2010. The changes in implementation date were made in response to similar comments to earlier versions of the regulations. Accordingly, the Commissioner rejects this comment. Moreover, similar comments were previously presented by the commentator and other commentators submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.

Summary of Comment (pages 7-9):

The proposed implementation dates are still unreasonable. This date was selected notwithstanding industry testimony that it was impossible to meet this deadline. FNF's Chief Information Officer submitted written testimony dated August 30, 2006 that even if he were to employ an army of outside consultants, it would take a minimum of 18 months to implement the statistical plan to the point of a 99% error-free requirement. This information was repeated at a workshop on May 9, 2007. FNF and First American accounts for two-thirds of all title insurance premiums in collected in California. Patricia Laffin testified that UTCs rely on third-party, off-the-shelf software which has a similar development time, even assuming these products are created at all.

Further, many aspects of the statistical plan such as historical data that previously has not been collected cannot be implemented, regardless of time and expense.

In order to have any hope of meeting the January 1, 2009 deadline for implementation of the proposed statistical plan, title industry participants would have to begin work no later than July 1, 2007. However, the compliance target continues to shift as meetings are conducted to explore ways to eliminate provisions of the Commissioner's proposed statistical plan.

Response to Comment:

See the immediately preceding response.

Summary of Comment (page 9):

The cost of complying with the proposed statistical plan is staggering. It, therefore, makes little sense for the industry to waste the time and resources needed to begin the process of implementing a statistical plan that is not final.

However, if the Commissioner doesn't amend the regulations to reduce the time necessary to implement the statistical plan, title insurers risk fines for failure to begin collecting data called for under the statistical plan on January 1, 2009.

The absence of a binding agreement with the Commissioner to suspend compliance for the evolving statistical plan for a reasonable period following the date on which the statistical plan is effective, the industry must either expend great resources (at a time when the real estate economy is at its lowest point in recent history and title and title companies are suffering losses or earning very modest profits) trying to implement statistical plan that is not yet final or undertake the risk that the Commissioner might seek to fine them for failure to implement the statistical plan by January 1, 2007.

Furthermore, title companies would have to make significant changes to their business models to collect the requested data. FNF previously testified that it has already reduced its staff to the bare minimum to needed to meet customer expectations. Obligating the companies to comply with additional reporting requirements will increase the time to process title insurance orders. Meanwhile, customers will expect to receive the same level of service and order processing time, which impacts borrowing costs. As a result, title insurance companies will be unable to meet the needs of their customers because of the data obligations.

The comments made by CDI during the statistical plan workshops have led the industry to believe that the Commissioner does not intend to subject the industry to the perils listed above. If this is true, FNF encourages the Commissioner to provide the industry the comfort necessary to spend resources on exploring alternatives to rate regulation and fine tune the statistical plan.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed revisions to the regulations or to the procedures followed in proposing these changes and additions to the rulemaking file. (Government Code Sections 11346.9 & 11346.8(c).) Moreover, these comments and similar comments were previously presented by the commentator and other commentators as part of those comments submitted on the prior versions of the proposed regulations and the Commissioner provided responses to these comments within the rulemaking file accordingly.